Abd Malek bin Hussin v Borhan bin Hj Daud & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3(S5)-21–20 OF 1999
MOHD HISHAMUDIN J
18 OCTOBER 2007

Constitutional Law — Fundamental liberties — Arrest of persons — Arrest under Internal Security Act — Whether detainee had constitutional right to be informed of grounds of arrest — Whether sufficient for arresting officer to serve detainee a form with statutory words — Whether sufficient compliance with Federal Constitution art 5(3)

Constitutional Law — Fundamental liberties — Detention — Whether every detention prima facie unlawful — Whether for the detaining authority to justify detention

Constitutional Law — Fundamental liberties — Personal liberty — Right of citizens to be protected from arbitrary arrest — Whether judges protectors of such rights — Federal Constitution art 5(3)

Constitutional Law — Fundamental liberties — Right to counsel — Whether a constitutional right — Reasons for such constitutional right — Whether refusal of detaining authority to grant detainee access to legal counsel unreasonable and mala fide — Federal Constitution art 5(3)

Constitutional Law — Preventive detention — Grounds of arrest — Whether detainee had constitutional right to be informed of grounds of arrest — Whether detainee to be told in clear and simple language the essence of why he is being arrested — Whether sufficient for arresting officer to serve detainee a form with statutory words — Federal Constitution art 5(3)

Criminal Procedure — Accused — Right to counsel — Accused detained under Internal Security Act — Whether accused had constitutional right to seek legal counsel — Reasons for such constitutional right — Whether refusal of detaining authority to grant detainee access to legal counsel unreasonable and mala fide — Federal Constitution art 5(3)

Criminal Procedure — Accused — Right to counsel — Whether a constitutional right — Whether refusal of detaining authority to grant detainee access to legal counsel unreasonable and mala fide — Federal Constitution art 5(3)

Criminal Procedure — Arrest — Grounds of arrest — Whether arrested person had constitutional right to be informed of grounds of arrest

Criminal Procedure — Arrest — When lawful — Whether every detention prima facie unlawful — Whether burden of proof upon detaining authority to justify detention

Preventive Detention — Detention — Whether lawful — Whether burden of proof upon detaining authority to justify detention

Preventive Detention — Detention order — Detention under Internal Security Act — Arrest — Grounds of arrest — Whether detainee had constitutional right to be informed of grounds of arrest — Whether sufficient for arresting officer to serve detainee a form with statutory words

Preventive Detention — Detention order — Detention under Internal Security Act — Arrest — Practice and procedure — Whether detainee ought to be informed of grounds of arrest — Whether sufficient for arresting officer to serve detainee a form with statutory words

Preventive Detention — Detention order — Detention under Internal Security Act — Whether detainee had constitutional right to counsel — Whether refusal of detaining authority to grant detainee access to legal counsel unreasonable and mala fide

Tort — Damages — Exemplary damages — Case involving false imprisonment and police brutality — Whether proper case for exemplary damages — Whether award of exemplary damages would reflect court's abhorrence to gross police brutality and abuse

Tort — Damages — False imprisonment — Quantum — Claimant unlawfully detained for 57 days — Aggravating factors — Whether aggravating factors would result in increased award

The plaintiff was arrested without a warrant by a group of Special Branch officers led by the first defendant on 25 September 1998, at about 10pm. The arrest occurred in front of his house just after he had been dropped off by a friend. The plaintiff was only vaguely told that he was being arrested

under the Internal Security Act 1960. He was then handcuffed and slapped thrice by the first defendant when he was unable to show the first defendant the location of his car. Thereafter, the first defendant and his men entered the plaintiff's house without a search warrant and seized several documents and items. He was then blindfolded and taken to the IPK Kuala Lumpur. During the journey to the IPK, apart wearing the blindfold, the plaintiff's head was forcibly covered with a T-shirt and the plaintiff was forced to bend forward and down between his legs in the car. At the IPK, Kuala Lumpur he was taken to an air-conditioned room at the first floor where he was stripped, drenched with water and made to stand in front of the air-conditioner. The plaintiff further testified that he was verbally abused and physically assaulted by the first defendant, the then Inspector-General of Police ('IGP') Tan Sri Rahim Noor, and several other police personnel. He was hit, punched and kicked repeatedly all over his body. His penis was hit and an object pushed against his anus. He lost his balance and fell down several times during the assault. At one instance when his blindfold slipped, he recognised one of the assailants as the second defendant — Tan Sri Rahim Noor, the then IGP. The plaintiff recounted that after the assault, his mouth was forced open and some foul urine-smelling liquid was poured into his mouth. This harrowing ordeal lasted until 4am on 26 September 1998. He was denied medical treatment for several days and was only taken to see a doctor — SD7 — on 29 September 1998. The plaintiff testified that he was taken to Bukit Aman on 26 September 1998 and interrogated for 19 days. The plaintiff averred that the interrogation was only focused on inter alia, his relationship with Datuk Seri Anwar Ibrahim, the 'reformasi' movement and opposition politics. All in all, the plaintiff spent 57 days in police custody and under solitary confinement. During this 57-day period he only saw his family twice and was denied access to counsel. The plaintiff sued the defendants for damages for the tort of false imprisonment as well as for the tort of assault and battery.

Held, allowing the plaintiff's claim:

(1) The cardinal principle is that every detention is, prima facie, unlawful and the burden of proof is on the detaining authority to justify the detention. In the instant case, the arrest and detention of the plaintiff was unlawful for the following reasons: (i) the plaintiff was never properly informed by the first defendant of the grounds of his arrest as required under art 5(3) of the Federal Constitution; (ii) the first defendant failed to satisfy the court with sufficient particulars and material evidence of the plaintiff's activities to justify the arrest and detention of the plaintiff under s 73(1) of the Internal Security Act 1960; and (iii) the arrest and detention of the plaintiff were mala fide

(see paras 6–7); *Abdul Ghani Haroon v Ketua Polis Negara and another application* [2001] 2 MLJ 689 and *R v Home Secretary, ex parte Khawaja* [1983] 2 WLR 321 referred.

(2) In respect of an arrest under the ISA, the legal and constitutional duty on the part of the arresting authority, as imposed by art 5(3) of the Federal Constitution, is to inform the person arrested of the grounds of his arrest. This duty must be discharged in a manner that makes the said constitutional protection meaningful. The detainee must be told briefly and in clear and simple language that he is being arrested because there is reason to believe that his activities — the gist of which should be told to the detainee — have been such as to justify his detention in order to prevent him from acting in a manner prejudicial to the security of the country (s 73(1)(a) of the ISA). The detainee must also be told that there is reason to believe that he has acted or is about to act or is likely to act in a manner prejudicial to the security of the country (s 73(1)(b) of the ISA). Here too, the detainee must be given some essential particulars as to the way he has acted or is about to act or is likely to act in the manner alleged to be prejudicial to the security of the country. It is not sufficient to merely parrot the provisions of s 8 or s 73(1)(b) of the ISA without some indication to the detainee of the substance of what he has done or of what he is about to do or of what he is likely to do. No detailed particulars need to be told to the detainee, but at least he should know the essence of why he is being arrested (see para 11); *Abdul Ghani Haroon v Ketua Polis Negara and another application* [2001] 2 MLJ 689 followed.

(3) In the instant case, the first defendant claimed he had informed the plaintiff that the plaintiff was being detained under the ISA for being involved in activities prejudicial to the country's security. The first defendant also claimed to have prepared a form, purportedly under art 5(3) of the Federal Constitution and issued to the plaintiff. The form inter alia stated that that the first defendant had grounds to detain the plaintiff under s 8 of the ISA and that the plaintiff had acted in a manner prejudicial to the country's security. However this form could not be taken to comply with art 5(3). In relation to compliance under s 73(1)(a), the form completely failed to meet the requirement as it mechanically parroted the words of the provision of s 73(1)(a) without showing that the arresting officer had directed his mind to the requirements of s 8. The form also failed in terms of the s 73(1)(b) requirement, since the plaintiff was not given the slightest clue as to what he had allegedly done or was likely to do or was about to do that was prejudicial to the security of the country. The plaintiff was thus never duly informed of the grounds of his arrest, as required under art 5(3) of the Constitution. It followed that his arrest was unlawful (see paras 12–14, 16–17).

(4) Article 5(3) of the Federal Constitution guarantees every person in this country of his personal liberty and protection from arbitrary arrest, particularly arbitrary arrest by the State. Judges are protectors of the fundamental liberties of the citizens and this is a sacred duty or trust which Judges must constantly uphold (see para 18).

(5) In the present case, the first defendant, failed to provide material evidence and particulars — sufficient to support a reasonable belief — to show the basis of his reason to believe that the detention of the plaintiff was necessary to prevent him from acting in a manner prejudicial to the security of Malaysia (the s 73(1)(a) limb) and also to show the basis of his reason to believe that the plaintiff had acted (or was likely to act or was about to act) in a manner prejudicial to the security of the country (the s 73(1)(b) limb). The first defendant's allegation that the plaintiff was involved in unlawful assemblies that tended to cause chaos and affect public order was merely a bare assertion. The nature of the plaintiff's interrogation showed clearly its political nature and that it was being done for collateral purposes and had nothing to do with genuine concern for national security. The plaintiff's arrest was from the very beginning mala fide (see paras 21–24).

(6) The arrest and detention of the plaintiff for 57 days was thus unlawful from the outset and the plaintiff was entitled to the reliefs claimed. The question of whether the detention of the plaintiff was extended lawfully as provided for under s 73(3), therefore, did not arise. Be that as it may, on the facts, the extension of the detention of the plaintiff required after the first 24 hours of detention were not done in compliance with s 73(3) of the ISA (see paras 25–26).

(7) The plaintiff had succeeded in proving to the court on a balance of probabilities that he had been assaulted in the manner alleged and by the individuals named or identified. The plaintiff was unshaken as a witness of truth on the witness stand. He stood firmly by his version of events as detailed in the document marked P2 and in his police report dated 13 March 1999. Contradictions, if at all there were any, in the plaintiff's police report were trivial in nature and did not differ substantially from the version given by the plaintiff in court (see paras 31 & 47).

(8) The plaintiff's access to a lawyer during his detention was a constitutional right provided for under art 5(3) of the Federal Constitution. The refusal of access to counsel was clearly an unreasonable conduct and showed mala fide on the part of the police. Access to a lawyer ensures that the treatment of a detainee has some transparency and that the detainee is accorded due process as stipulated

by the Constitution and the law. Denial of access to counsel allows detaining authorities that act mala fide to do as they wish with a detainee (see paras 49–50, 57).

(9) Reasonable general damages for the plaintiff detained unlawfully for 57 days would be RM700,000. However, considering the aggravating factors in the instant case such as the breach of the plaintiff's constitutional and fundamental rights; denial of access to counsel; the denial of access to family members; the length of the period of solitary confinement; the interrogation for 19 days on matters not related to internal security; the repeated assaults whilst being handcuffed and blindfolded; and the injury to the plaintiff's reputation as a consequence of the arrest and detention would increase the award of general damages for the wrongful arrest and unlawful detention to RM1m. An appropriate assessment of general damages for the assaults and ill-treatment taking into account the aggravating factors would be RM500,000 (see paras 52–54).

(10) The circumstances of this case were such that it was appropriate for an award of exemplary damages. In the instant case, the behavior of the defendants was inhumane, cruel and despicable. The plaintiff was not just arrested and detained unlawfully for 57 days but was also subjected to vile assaults, unspeakable humiliation, and prolonged physical and mental ill-treatment. The despicable conduct of the then Inspector General of Police, Tan Sri Rahim Noor, was shameful and a disgrace. He had shown an extremely bad example to the thousands of police officers under his charge. The award of exemplary damages was necessary to show the abhorrence of the court to the gross abuse of power under the Internal Security Act. The award of exemplary damages will ensure that the extent of abuse is kept to a minimum, if not eliminated completely (see paras 55–56); *Rookes v Barnard* [1964] AC 1129 followed.

Observation:

The Special Branch must not only be neutral but must also be seen to be neutral and non partisan. It must be above politics. The practice of torturing detainees by the police can never and should never be condoned by the court. The court must show its utmost disapproval in no uncertain terms (see para 57).

[Bahasa Malaysia summary

Plaintif telah ditangkap tanpa waran oleh sekumpulan pegawai Cawangan Khas diketuai oleh defendan pertama pada 25 September 1998, lebih kurang pukul 10 malam. Tangkapan tersebut berlaku di hadapan rumahnya sejurus beliau diturunkan oleh rakannya. Plaintif hanya diberitahu sedikit tentang

penangkapan beliau di bawah Akta Keselamatan Dalam Negeri 1960. Beliau kemudian telah digari tangannya dan ditempeleng tiga kali oleh defendan pertama apabila beliau enggan menunjukkan defendan pertama di mana keretanya diletakkan. Selepas itu, defendan pertama dan orangnya telah memasuki rumah plaintif tanpa waran geledah dan merampas beberapa dokumen dan barangan. Mata beliau kemudiannya telah ditutup dan dibawa ke IPK Kuala Lumpur. Semasa ke IPK, selain daripada memakai penutup mata, kepala plaintif telah ditutup secara paksa dengan kemeja T dan plaintif telah dipaksa tunduk ke hadapan dan ke bawah antara kakinya dalam kereta. Di IPK, Kuala Lumpur beliau dibawa ke bilik berhawa dingin di tingkat pertama di mana beliau ditanggalkan pakaiannya, dibasahkan sehingga kuyup dengan air dan dipaksa berdiri di hadapan hawa dingin. Plaintif seterusnya memberikan keterangan bahawa beliau di caci maki secara lisan dan diserang secara fizikal oleh defendan pertama, yang pada masa itu Ketua Polis Negara ('KPN') Tan Sri Rahim Noor, dan beberapa penjawat polis lain. Beliau dipukul, ditumbuk dan diterajang berkali-kali di seluruh badannya. Kemaluan lelakinya dipukul dan satu objek telah ditolak ke dalam duburnya. Beliau hilang imbangan dan terjatuh beberapa kali semasa serangan itu. Di satu ketika semasa penutup matanya terbuka, beliau mengenali salah seorang daripada penyerang sebagai defendan kedua — Tan Sri Rahim Noor, pada masa itu KPN. Plaintif menceritakan bahawa selepas serangan itu, mulutnya telah dipaksa buka dan cecair berbau air kencing telah dimasukkan ke dalam mulutnya. Pengalaman yang mengganggu perasaan ini berlarutan sehingga 4 pagi pada 26 September 1998. Beliau tidak diberikan rawatan perubatan untuk beberapa hari dan hanya dibawa berjumpa doktor — SD7 — pada 29 September 1998. Plaintif memberi keterangan bahawa beliau telah dibawa ke Bukit Aman pada 26 September 1998 dan disoal siasat selama 19 hari. Plaintif menegaskan bahawa soal siasat tersebut hanya memfokuskan antara lain hubungan beliau dengan Datuk Seri Anwar Ibrahim, gerakan reformasi dan politik pembangkang. Secara keseluruhannya, plaintif berada dalam kawalan polis dan di bawah pengurungan bersendirian selama 57 hari. Selama tempoh 57 hari tersebut beliau hanya dapat berjumpa keluarganya dua kali dan tidak dibenarkan melantik peguam. Plaintif telah menyaman defendan-defendan untuk ganti rugikerana pemenjaraan palsu dalam tort dan juga untuk serangan dan serangan sentuh dalam tort.

Diputuskan, membenarkan tuntutan plaintif:

(1) Prinsip utama adalah bahawa setiap penahanan adalah, prima facie, tidak sah dan beban bukti terletak atas pihak berkuasa yang menahan untuk menjustifikasikan penahanan. Dalam kes semasa, tangkapan dan tahanan plaintif adalah tidak sah untuk alasan-alasan berikut: (i) plaintif tidak diberitahu secara rasmi oleh defendan pertama tentang

alasan-alasan tangkapan seperti yang dikehendaki di bawah perkara 5(3) Perlembagaan Persekutuan; (ii) defendan pertama telah gagal memuaskan mahkamah dengan butiran yang mencukupi dan keterangan penting tentang kegiatan plaintif untuk menjustifikasikan tangkapan dan tahanan plaintif di bawah s 73(1) Akta Keselamatan Dalam Negeri 1960; dan (iii) tangkapan dan tahanan plaintif adalah mala fide (lihat perenggan 6–7); *Abdul Ghani Haroon v Ketua Polis Negara and another application* [2001] 2 MLJ 689 dan *R v Home Secretary, ex parte Khawaja* [1983] 2 WLR 321 dirujuk.

(2) Berhubung suatu tangkapan di bawah AKDN, tanggungjawab dari segi undang-undang dan perlembagaan di pihak badan berkuasa yang menahan, seperti yang dikenakan oleh perkara 5(3) Perlembagaan Persekutuan, adalah untuk memberitahu seseorang yang ditahan tentang alasan-alasan tangkapannya. Tanggungjawab ini hendaklah dilaksanakan secara mana akan membuat perlindungan berperlembagaan bermakna. Orang yang ditahan hendaklah diberitahu secara ringkas dan jelas dan dalam bahasa mudah bahawa beliau telah ditahan kerana terdapat alasan untuk mempercayai bahawa aktiviti-aktivitnya — inti patinya yang patut diberitahu kepada orang yang ditahan itu — adalah sebegitu rupa untuk menjustifikasikan penahanannya bagi tujuan menghalangnya bertindak dalam cara yang boleh menjejaskan keselamatan negara (s 73(1)(a) AKDN). Orang yang ditahan juga hendaklah diberitahu bahawa terdapat alasan untuk mempercayai bahawa beliau telah ebrtindak atau akan bertindak atau berkemungkinan bertidak dalam cara yang boleh menjejaskan keselamatan negara (s 73(1)(b) AKDN). Di sini juga, orang yang ditahan hendaklah diberikan beberapa butiran penting berhubung cara mana beliau telah bertindak atau akan ebrtidnak atau berkemungkinan bertindak yang dikatakan boleh menjejaskan keselamatan negara. Ia tidak mencukupi dengan hanya menyebut semula peruntukan s 8 atau s 73(1)(b) AKDN tanpa memberitahu kepada orang yang ditahan perkara apakah yang beliau telah lakukan atau apa yang beliau akan lakukan atau apa yang beliau mungkin akan lakukan. Tiada butiran terperinci diperlukan untuk memberitahu orang yang ditahan, cuma sekadar yang beliau mengetahui inti pati kenapa beliau telah ditangkap (lihat perenggan 11); *Abdul Ghani Haroon v Ketua Polis Negara and another application* [2001] 2 MLJ 689 diikut.

(3) Dalam kes semasa, defendan pertama telah mendakwa bahawa beliau telah memaklumkan plaintif bahawa plaintif telah ditahan di bawah AKDN kerana terlibat dalam aktiviti-aktiviti yang menjejaskan keselamatan Negara. Defendan pertama juga mendakwa telah menyediakan boring, bagi maksud di bawah perkara 5(3) Perlembagaan Persekutuan dan menyerahkan kepada plaintif. Borang tersebut antara lain menyatakan bahawa defendan pertama mempunyai alas an-alasan

untuk menahan plaintif di bawah s 8 AKDN dan bahawa plaintif telah bertindak dalam cara yang boleh menjejaskan keselamatan Negara. Bagaimanapun boring ini tidak boleh dianggap telah mematuhi perkara 5(3). Berkaitan pematuhan di bawah s 73(1)(a), borang tersebut langsung tidak memenuhi keperluan tersebut kerana ia menyatakan secara mekanikal perkataan-perkataan peruntukan s 73(1)(a) tanpa menunjukkan bahawa pegawai yang membuat tahanan telah mengarahkan mindanya kepada keperluan-keperluan s 8. Borang tersebut juga gagal menurut terma keperluan s 73(1)(b) memandangkan plaintif tidak sedikitpun diberikan petanda tentang apa yang beliau dikatakan telah lakukan atau apa yang kemungkinan melakukan atau apa yang akan dilakukannya yang menjejaskan keselamatan negara. Plaintif oleh itu tidak pernah diberitahu tentang alasan-alasan tangkapannya, sepertimana yang dikehendaki di bawah perkara 5(3) Perlembagaan. Dengan itu tangkapan beliau adalah salah di sisi undang-undang (lihat perenggan 12–14, 16–17).

(4) Perkara 5(3) Perlembagaan Persekutuan memberi jaminan kepada setiap orang dalam negara ini kebebasan peribadi dan perlindungan daripada tangkapan sewenang-wenangnya, khususnya tangkapan sewenang-wenangnya oleh Kerajaan. Para hakim merupakan pelindung kepada kebebasan asasi rakyat dan ini merupakan tanggungjawab yang murni atau amanah yang mana hakim-hakim patut sentiasa kekalkan (lihat perenggan 18).

(5) Dalam kes semasa, defendan pertama, telah gagal untuk mengemukakan keterangan dan butiran penting — yang mencukupi untuk menyokong suatu kepercayaan yang munasabah — untuk menunjukkan asas alasannya untuk mempercayai bahawa penahanan plaintif adalah wajar untuk menghalangnya daripada bertindak dalam cara yang boleh menjejaskan keselamatan Malaysia (cabang s 73(1)(a)) dan juga untuk menunjukkan asa alasannya untuk mempercayai bahawa plaintif telah bertindak (atau mungkin telah bertindak atau akan bertindak) dalam cara yang boleh menjejaskan keselamatan negara (cabang s 73(1)(b)). Dakwaan defendan pertama bahawa plaintif terlibat dalam perhimpunan yang salah di sisi undang-undang yang bertujuan menyebabkan kekecohan dan menjejaskan keamanan awam hanya merupakan dakwaan kosong. Sifat soal siasat plaintif menunjukkan dengan jelas bersifat politik dan ia telah dilakukan untuk tujuan kolateral dan tiada kaitan langsung dengan rasa bimbang yang sebenar tentang keselamatan negara. Tangkapan plaintif dari mula lagi berunsur adalah mala fide (lihat perenggan 21–24).

(6) Tangkapan dan penahanan plaintif selama 57 hari dengan itu adalah salah di sisi undang-undang dari awal lagi dan plaintif berhak terhadap relif-relif yang dituntut. Persoalan sama ada penahanan plaintif telah

dilanjutkan dengan sah seperti yang diperuntukkan di bawah s 73(30, oleh itu, tidak timbul. Namun begitu,, berdasarkan fakta-fakta tersebut, lanjutan tahanan plaintif yang diperlukan selepas 24 jam pertama penahanan tidak dilakukan menurut s 73(3) AKDN (lihat perenggan 25–26).

(7) Plaintif telah berjaya membuktikan kepada mahkamah atas imbangan kebarangkalian bahawa beliau telah diserang dalam cara yang dikatakan dan oleh individu-individu yang dinamakan atau dikenalpasti. Plaintif tidak goyah sebagai saksi di kandang saksi. Beliau tetap pendirian dengan versinya tentang kejadian seperti yang dinyatakan dalam dokumen bertanda P2 dan dalam laporan polis bertarikh 13 Mac 1998. Percanggahan, jikapun ada, dalam laporan polis amat kecil sifatnya dan tiada perbezaan ketara daripada versi yang telah diberikan oleh plaintif (lihat perenggan 31 & 47).

(8) Akses plaintif kepada peguam semasa beliau ditahan merupakan hak perlembagaan yang diperuntukkan di bawah perkara 5(3) Perlembagaan Persekutuan. Keengganan memberikan akses kepada peguam jelas satu perbuatan yang tidak munasabah dan menunjukkan mala fide di pihak polis. Akses kepada polis adalah untuk memastikan layanan orang yang ditahan adalah telus dan agar orang yang dilayan diberikan hak menurut proses yang sewajarnya seperti yang telah ditetapkan oleh Perlembagaan dan undang-undang. Penafian akses kepada peguam membenarkan pihak berkuasa yang membuat penahanan yang telah bertindak mala fide berbuat sesuka hati mereka dengan orang yang ditahan (lihat perenggan 49–50, 57).

(9) Ganti rugi am yang munasabah untuk plaintif yang telah ditahan secara salah di sisi undang-undang selama 57 hari adalah RM700,000. Bagaimanapun, setelah mempertimbangkan faktor-faktor tambahan dalam kes semasa seperti pelanggaran hak-hak perlembagaan dan asasi plaintif, penafian akses kepada peguam, penafian akses kepada ahli keluarga, tempoh lama dikurung sendirian, soal siasat selama 19 hari berdasarkan perkara yang tiada kaitan dengan keselamatan dalaman, serangan berkali-kali tatkala digari dan ditutup mata; dan reputasi plaintif yang terjejas akibat tangakapan dan tahanan menambahkan award ganti rugi am untuk tangkapan salah dan penahanan yang salah di sisi undang-undang kepada RM1j. Penaksiran sewajarnya untuk ganti rugi am untuk serangan dan layanan buruk dengan mengambilkira faktor-faktir tambahan adalah RM500,000 (lihat perenggan 52–54).

(10) Keadaan kes ini adalah sedemikian sehingga ia mewajarkan satu award untuk ganti rugi teladan. Dalam kes semasa, kelakuan defendan-defendan adalah tidak berperikemanusiaan, kejam dan bersifat keji. Plaintif bukan sahaja ditangkap dan ditahan secara salah

di sisi undang-undang selama 57 hari tetapi juga menjadi subjek serangan yang keji, telah dimalukan sehingga tidak terkata, dan dilayan dengan buruk secara fizikal dan mental. Perbuatan keji Ketua Polis Negara ketika itu, Tan Sri Rahim Noor, amat memalukan dan mengaibkan. Beliau telah menunjukkan satu contoh yang tidak baik kepada beribu pegawai polis di bawah kuasanya. Award untuk ganti rugi teladan adalah perlu untuk menunjukkan kebencian mahkamah terhadap penyalahgunaan kuasa yang melampau di bawah Akta Keselamatan Dalam Negeri. Award ganti rugi teladan akan memastikan bahawa penyalahgunaan tersebut di tahap minimum, jika tidak dapat dihapuskan sama sekali (lihat perenggan 55–56); *Rookes v Barnard* [1964] AC 1129 diikut.

Pemerhatian:

Cawangan Khas bukan hanya perlu bersikap neutral tetapi juga hendaklah dilihat sebagai neutral dan bukan penyokong kuat suatu pasukan. Ia hendaklah bebas daripada unsur politik. Amalan menyeksa orang yang ditahan oleh polis tidak boleh dan tidak patut dibiarkan sahaja oleh mahkamah, Mahkamah hendaklah menunjukkan rasa tidak setuju sejelas-jelasnya tanpa apa-apa keraguan (lihat perenggan 57).]

Notes

For a case on arrest, when lawful, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 797.

For a case on detention, when lawful, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1310.

For cases on accused's right to counsel, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 49–52.

For cases on arrest of persons, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2005–2006.

For cases on detention, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2011–2016.

For cases on detention under Internal Security Act, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1379–1389.

For cases on exemplary damages, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 198–201.

For cases on false imprisonment, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 202–203.

For cases on grounds of arrest under constitutional law, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2268–2269.

For cases on grounds of arrest under criminal procedure, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 763–766.

For cases on personal liberty, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2106–2113.

A For cases on right to counsel, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2154–2173.

Cases referred to

Abdul Ghani Haroon v Ketua Polis Negara and another application [2001] 2 B MLJ 689 (folld)
Mohamad Ezam bin Mohd Noor v Ketua Polis Negara and other appeals [2002] 4 MLJ 449 (refd)
R v Home Secretary, ex parte Khawaja [1983] 2 WLR 321 (refd)
Rookes v Barnard [1964] AC 1129 (folld)

C

Legislation referred to

Federal Constitution art 5(3)
Internal Security Act 1960 ss 8, 73(1), (3)(a), (b), (c)
Lockup Rules 1953 r 20

D *R Sivarasa (M Moganambal with him) (Daim & Co) for the plaintiff.*
Kamaludin bin Mohd Said, Senior Federal Counsel (Iznan bin Ishak, Senior Federal Counsel and Mohaji bin Selamat, Federal Counsel with him) (Attorney-General's Chambers) for the defendants.

E **Mohd Hishamudin J:**

[1] In the present case, the plaintiff is claiming against the defendants for damages for the tort of false imprisonment as well as for the tort of assault F and battery.

[2] At the material time the plaintiff was employed in various capacities in a number of companies. The first defendant at the material time was a police officer with the rank of Assistant Superintendent of Police attached to the G Special Branch Department, Police Headquarters (IPK), Kuala Lumpur. The second defendant is the Inspector-General of Police. The claim against the third defendant, that is the Federal Government, is for vicarious liability in respect of the torts of the first and second defendants.

H **[3]** Briefly, the plaintiff alleges that he was unlawfully arrested without a warrant of arrest by a group of Special Branch officers led by the first defendant at about 10 o'clock at night on 25 September, 1998. The arrest occurred in front of his house, as he was returning home and after he had just alighted from a car driven by a friend. He was not clearly told by the first I defendant of the reason for the arrest. He was only vaguely told that he was arrested under the Internal Security Act. The plaintiff alleges that at the time of arrest he was handcuffed and given a hard slap thrice by the first defendant when he was unable to show the first defendant the location of his car. After the arrest, the first defendant and his men entered the plaintiff's house

without a search warrant and seized several documents and items. He was then blindfolded and taken to the Ibu Pejabat Polis Kontinjen ('the IPK'), Kuala Lumpur, where in a room at the first floor he was stripped naked, humiliated, and subjected to prolonged mental and physical torture by the first defendant together with the then Inspector-General of Police, Tan Sri Rahim Noor, and several other police personnel. The ordeal lasted until 4 in the morning. He was denied medical treatment for several days. Only on 29 September that he was taken to see a doctor, Dr Vasantha (SD7).

[4] It is the allegation of the plaintiff that he was taken to Bukit Aman the following day after the arrest (26 September 1998) and at Bukit Aman he was interrogated for 19 days. All in all he was in police custody for 57 days until his release on 21 November 1998.

[5] While in police custody he was denied access to counsel. He was also denied access to his family members. His family was allowed to see him only after he was kept in custody for 27 days, and throughout the entire 57 days under detention his family was allowed to see him only twice. Throughout these 57 days of detention he was kept under solitary confinement and, as said earlier, was interrogated for 19 days — interrogated not on matters affecting the security of the country but on political matters.

WHETHER THE ARREST AND DETENTION OF THE PLAINTIFF WERE LAWFUL?

[6] As I have ruled in *Abdul Ghani Haroon v Ketua Polis Negara and another application* [2001] 2 MLJ 689, the cardinal principle is that every detention is, prima facie, unlawful and the burden of proof is on the detaining authority to justify the detention (see also *R v Home Secretary, ex parte Khawaja* [1983] 2 WLR 321).

[7] In my judgment, the arrest and detention of the plaintiff was unlawful for the following reasons:

a The plaintiff was never properly informed by the first defendant of the grounds of his arrest as required under art 5(3) of the Federal Constitution.

b The first defendant failed to satisfy the court with sufficient particulars and material evidence of the plaintiff's activities to justify the arrest and detention of the plaintiff under s 73(1) of the Internal Security Act 1960.('the ISA').

c The arrest and detention of the plaintiff were mala fide.

[8] Article 5 of the Federal Constitution states:

> 5. Liberty of the person.
>
> 1 No person shall be deprived of his personal liberty save in accordance with the law.
>
> 2 ...
>
> 3 Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

[9] Section 73(1) of the ISA reads:

> 73. Power to detain suspected persons.
>
> 1 Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe —
>
> (a) that there are grounds which would justify his detention under section 8; and
>
> (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

[10] It is to be observed that the above provision makes reference to s 8 of the ISA. Section 8(1) provides:

> 8. Power to order detention or restriction of persons.
>
> 1 If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years.

The plaintiff was not informed of his grounds of arrest

[11] In respect of an arrest under the ISA, the legal and constitutional duty on the part of the arresting authority, as imposed by art 5(3) of the Federal Constitution, is to inform the person arrested of the grounds of his arrest. This duty must be discharged in a manner that makes the said constitutional protection meaningful. This means that the detainee must be told briefly and

in clear and simple language that he is being arrested because there is reason to believe that his activities (the gist of which should be intimated to the detainee) have been such as to justify his detention in order to prevent him from acting in a manner prejudicial to the security of the country (in the context of the present case, and for the sake of simplicity, I do not propose to touch on the other two alternative limbs as provided for under s 8 of the ISA). This, however, would only satisfy limb (a) of s 73(1). In addition, in order to also satisfy limb (b) of s 73(1), the detainee must also be told that there is reason to believe that he has acted or is about to act or is likely to act in a manner prejudicial to the security of the country. Here too, the detainee must be given, albeit, in a brief form, some idea in substance (that is to say, some essential particulars) in what way he has acted or is about to act or is likely to act in the manner alleged to be prejudicial to the security of Malaysia. It is my view that, in order to satisfy these two limbs/grounds, it does not suffice to merely parrot the provisions of s 8 or s 73(1) (b) without some indication to the detainee of the substance of what he has done or of what he is about to do or of what he is likely to do. At this point, no detailed particulars need to be informed to the detainee but at least he will know in essence the reason he is being arrested. In this regard, I refer to my decision in the case of *Abdul Ghani Haroon v Ketua Polis Negara and another application* [2001] 2 MLJ 689.

[12] In the present case, the plaintiff's evidence is that all he was told at the point of arrest (and even then he was told only after he asked) was that he was being arrested under the ISA. The first defendant, however, says as follows:

> Saya memberitahu plaintif bahawa dia ditangkap di bawah Akta Keselamatan Negara 1960 kerana terlibat dengan kegiatan mengancam dan memudaratkan keselamatan Negara.

[13] He also says that after taking the plaintiff to the IPK, KL, and after lodging a police report:

> ... saya kemudiannya telah menyediakan dokumen [a form exhibited at p 1 of Bundle B] di bawah perkara 5(3) Perlembagaan Persekutuan dan memberi penjelasan kepada plaintif tentang alasan tangkapannya.

[14] Even assuming for the moment that I were to accept the first defendant's version, still, for the reasons that I have stated above, this cannot be sufficient compliance with the stipulation of art 5(3) of the Constitution read together with s 73(1) of the ISA. His words do not convey to the plaintiff the essence of what the plaintiff is alleged to have done that his detention is necessary to prevent him from acting in a manner prejudicial to the security of Malaysia.

[15] The first defendant also relies on the form at page 1 of Bundle B as compliance by the arresting office of the need to inform the grounds of arrest under art 5(3). The form merely states:

> Saya Borhan bin Hj Daud (G/7624) pada 25 September 1998 jam 2310 hrs telah memberitahu kamu Abdul Malik bin Hussin No: K/P: 560814-06-5467 sebab-sebab kamu ditangkap di bawah s 73(1) Akta Keselamatan Dalam Negeri 1960 iaitu:
>
> (a) Saya mempercayai ada alasan-alasan untuk menahan kamu di bawah s 8 Akta Keselamatan Dalam Negeri 1960; dan
>
> (b) Saya mempercayai kamu telah bertindak dengan cara yang memudaratkan keselamatan Malaysia.

[16] It is my judgment that, in the light of what I have said above, this form cannot be taken to be due compliance with art 5(3). In relation to compliance under s 73(1)(a), the form completely fails to meet the requirement as it mechanically parrots the words of the provision of s 73(1)(a) without showing that the arresting officer had directed his mind to the requirements of s 8. I had pointed out this requirement in *Abdul Ghani Haroon*. The form also fails in terms of the s 73(1)(b) requirement, since the plaintiff was not given the slightest clue or intimation as to what he had allegedly done or was likely to do or was about to do that was prejudicial to the security of the country.

[17] Since the plaintiff was never duly informed of the grounds of his arrest, as he was entitled to under art 5(3) of the Constitution, it follows that the arrest was unlawful.

[18] In dealing with art 5(3) of the Constitution, I am mindful of the fact that I am presently dealing with the fundamental liberty of the citizens. The preservation of the personal liberty of the individual is a sacred universal value of all civilized nations and is enshrined in the Universal Declaration of Human Rights and Fundamental Freedoms of 1948. Article 5(3) of the Federal Constitution guarantees every person in this country of his personal liberty and protection from arbitrary arrest particularly arbitrary arrest by the State. As I have said in *Abdul Ghani Haroon*, and I will say it again now, judges are protectors of the fundamental liberties of the citizens and that this is a sacred duty or trust which Judges must constantly uphold.

The first defendant failed to satisfy the court with sufficient particulars and material evidence

[19] In *Abdul Ghani Haroon*, I had ruled that:

> the arresting officer must, in his affidavit, furnish, not necessarily detailed particulars, but some reasonable amount of particulars, not only for the purpose of satisfying the court that he has some basis for the arrest but also to be fair to the detainee — to enable the detainee, who believes that he is innocent, to defend himself.

[20] This approach has since been endorsed by the Federal Court in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara and other appeals* [2002] 4 MLJ 449. In *Mohamad Ezam bin Mohd Noor* the Federal Court declared the correct law as requiring an objective test.

[21] In the present case, the first defendant, therefore, has to provide sufficient material evidence and particulars to show the basis of his reason to believe that the detention of the plaintiff was necessary to prevent him from acting in a manner prejudicial to the security of Malaysia (the s 73(1)(a) limb) and also to show the basis of his reason to believe that the plaintiff had acted (or was likely to act or was about to act) in a manner prejudicial to the security of the country (the s. 73(1)(b) limb).

[22] In the present case, however, this was not done. Instead, all the first defendant could say in his evidence was the bare assertion that:

> Plaintif terlibat secara langsung di dalam perhimpunan haram yang di mana setiap perhimpunan haram tersebut diakhiri dengan kacau bilau dan mengganggu ketenteraman awam.

[23] No material particulars or evidence was ever produced to the court to substantiate the above assertion. The dates and places of the alleged 'unlawful assemblies' were never stated by the first defendant. It was never even shown by the first defendant that the so-called 'unlawful assemblies' were actually unlawful in the first place. It was never shown by the first defendant that each and every one of the 'unlawful assemblies' ended up with rioting and public disorder as he alleged. No specifics were ever given as to how the plaintiff was 'terlibat secara langsung' in those assemblies or, if even he was, in what manner. I am not suggesting of proof beyond reasonable doubt but of the existence of material evidence and particulars to support a reasonable belief. Hence, the allegation by the first defendant was a bare assertion without particulars.

[24] The plaintiff, on the other hand, furnishes unchallenged evidence that at no time during his interrogation in Bukit Aman were any specific questions put to him that he was connected to any violent act of any kind or planning any specific violent act. He gives detailed and unchallenged evidence of the content of the interrogations he endured for 19 days at Bukit Aman.

In summary, it was about his relationship with Datuk Seri Anwar Ibrahim, the plaintiff's role in the reformasi movement, meetings between Nurul Izzah, Dr Wan Azizah and Keadilan leaders with foreign political leaders, allegations about Datuk Seri Anwar Ibrahim's sexual activities and the plaintiff's relationship with the opposition party, PAS, and Dato' Fadzil Noor, and his views on the ISA. He was told by his interrogators not to file a habeas corpus application. The nature of the interrogation shows clearly its political nature and that it was being done for collateral purposes ie intelligence gathering for political purposes and nothing to do with genuine concern for national security. This further reinforces the plaintiff's contention that the first defendant never had a basis at the material time of the arrest (or, for that matter, at any time thereafter) for a reasonable belief under s 73(1). In other words, the arrest was from the very beginning mala fide.

Whether the detention of the plaintiff was extended lawfully?

[25] In the light of what I have said above, it therefore follows that the arrest and detention of the plaintiff for 57 days was unlawful from the outset and that the plaintiff is entitled to the declaration prayed for in para 14(a) of the statement of claim and to damages. The question of whether the detention of the plaintiff was extended lawfully as provided for under s 73(3), therefore, does not arise and would be quite academic. However, for the sake of completeness, I shall in this judgment, nevertheless, deal with the issue.

[26] In my judgment, the extensions of the detention of the plaintiff which were required after the first 24 hours of detention were not done in compliance with s 73(3) for the following reasons. Section 73(3) stipulates:

> Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8:
>
> Provided that —
>
> (a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;
>
> (b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and
>
> (c) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and

[27] I had dealt with the law on this issue extensively in *Abdul Ghani Haroon*. There I held that the officer extending the detention had to be objective, independent minded and professional and to make his own judgment without fear or favour. He should exercise his own discretion without being directed or influenced by his superiors to extend the detention. He should also justify the extension by describing the purpose of the pending inquiries which must relate to the 'reason to believe' under s 73(1). He should also explain plausibly - although not with a detailed minute by minute account — why the investigation could not be completed within 24 hours, or within 48 hours, or within 30 days, as the case may be. I had in that case opined that the purpose of s 73(3)(a), (b) and (c) was to provide built-in departmental safeguards and that the court must, and indeed, has the power to evaluate the exercise of discretion in extending the detention.

[28] In the present case, the SB Forms 28A signed by the officers extending the plaintiff's detention beyond 24 hours and beyond 48 hours, respectively, are exhibited before the court. The officers involved were ASP Koh Seok Keng (SD9) and ASP Cheong Ah Mooi (SD10), and both gave evidence before this court. It is my finding that both Forms 28A and the officers' evidence did not address the legal requirements of spelling out the purpose of the detention and relating it to the 'reason to believe' with sufficient particulars. Neither did they explain plausibly why the extensions were needed. It is clear from the provisions of s 73(3) that investigation is to be commenced immediately upon arrest and any extension beyond 24 hours, or beyond 48 hours, or beyond 30 days, as the case may, has to be authorized by the appropriate officer, as stipulated by the provisions. The investigating team is not supposed to sit back and do nothing for 24 hours. It would, therefore, be incumbent for an officer authorizing the first extension to find out what investigation had been carried out in the first 24 hours and what else needed to be done. SD9, however, did nothing of that sort and is only able to say that investigations had not begun without being able to explain why.

[29] Similarly, SD10 is not able to inform the court as to what investigations had been done in the first 48 hours after the plaintiff's arrest, or to say what else needed to be done. She merely says that the investigation was in its early stages and could not be completed in a short period. She, however, also says that she did not receive or read or see any report in the file of any investigation that had been done so far with the plaintiff. She acknowledges that her role was to ensure that there was a basis to continue investigations which had not been completed. However, her own evidence fails to disclose the particulars for a basis to extend the detention beyond 48 hours and up to 28 days. Both SD9 and SD10 appear to have

acted in an automatic and rubber-stamping fashion by merely signing the Forms 28A without applying their minds as to the necessity and purpose of the extension.

[30] The final extension was done by DSP Philip Savariappan (SD8) who during the trial did not reappear in court for re-examination after the conclusion of cross-examination. Exhibit D11 is a report to the Minister (SB Form 30) signed by SD8 in purported compliance with s 73(3)(c) to authorize a further detention of the plaintiff of more than 30 days. Section 73(3)(c) of the ISA stipulates that this report to the Minister must be made either by the Inspector-General of Police (the IGP) himself or by an officer designated by the IGP. SD8 in evidence claimed that he forwarded the report to the Minister pursuant to a 'delegation of powers' under s 73(3)(c). It is to be noted that para (c) of sub-s (3) does not provide for a delegation by the IGP of his functions: it merely provides for the designation of an officer by the IGP. However, be that as it may, no documentary evidence was ever produced to the court to show any instrument of 'delegation of powers' or that SD8 was the officer designated by the Inspector-General under s 73(3)(c) to report to the Minister on the Inspector-General's behalf. In cross-examination when SD8 was asked as to the basis of the further detention, he was only able to say that he received a request from the Special Branch to extend the detention beyond 30 days and on that basis he signed and forwarded D11 to the Minister. His answers also show that he acted in an automatic and rubber-stamping fashion. He confirmed that he had never refused a request for extension. He was unable to explain as to why it was necessary to extend the detention when the plaintiff had asserted in his evidence that after the 19th day of detention interrogation ceased and he was left alone. What SD8 did in the present case was merely to send to the Minister the very report that was submitted to him by one DSP Sofian. There was no evaluation of DSP Sofian's report by him or by the IGP. In short, SD8 acted merely as a 'go-between' between DSP Sofian and the Minister. That is not the intention of sub-s (3)(c) in respect of the role IGP or his designated officer.

WHETHER THE PLAINTIFF WAS ASSAULTED DURING HIS DETENTION?

[31] On this issue, upon a careful evaluation of the entire evidence before me, it is my finding of facts that the plaintiff has succeeded in proving to the court on a balance of probabilities that he had been assaulted in the manner he alleges and by the individuals that he has named or identified.

[32] The plaintiff alleges that he was first assaulted by the first defendant after the arresting team moved him from his home. He was arrested in front

of his home after which a search of his home was done and various documents and a personal computer removed. He describes the assault in his evidence. He says he was slapped three times by the first defendant after he was unable to take the first defendant to the location of his (the plaintiff's) car. The plaintiff also said that he was blindfolded, and his head was forcibly covered with a T-shirt and forced to bend forward down between his legs in the car as he was taken to the IPK, Kuala Lumpur.

[33] The first defendant denies these allegations. He only admits that he instructed L/Cpl Johari to place 'cermin mata gelap' on the plaintiff, and that the purpose being 'adalah bertujuan untuk menutup penglihatan plaintiff bagi mengelirukan plaintif'. The plaintiff then describes the circumstances of the second assault. In summary, he describes how in an air-conditioned room on the first floor of the IPK he was stripped naked, blindfolded, verbally abused and then physically assaulted. He was hit several times on the face and head. Most of the blows and kicks were directed at his body and legs. His legs were hit with a hard object. He fell over several times as a result of the blows. At one instance when his blindfold slipped, he identified one of the assailants as the second defendant in person — Tan Sri Rahim Noor. The plaintiff also said that after the episode of physical assault, some urine-smelling like liquid was poured into his mouth while his mouth was forced open. Throughout the ordeal he was forced to remain naked. His penis was hit and an object pushed against his anus. He was made to stand in front of an air-conditioner and drenched with water — this treatment was done for almost an hour. The ordeal finally ended at about 4am. According to the plaintiff when the blindfold was removed he saw the first defendant and other Special Branch officers in plainclothes. The first defendant warned him not to make a police report regarding what had happened. The plaintiff also asked for medical treatment from the detaining officer but access to a doctor was only provided three days later on 29 September 1998.

[34] The first defendant's version is a complete denial. He says the plaintiff was never stripped or beaten or ill-treated in any manner. He says that all that happened in what is called the 'bilik dokumentasi' on the first floor was that the plaintiff was kept in a room handcuffed whilst the documents and items seized from his home were checked and a list made up. This took about one and a half hours. The plaintiff was then photographed by Sgt Samat Abd Hamid (SD4) at 4am. on 26 September 1998 and then kept in the same room as he was earlier kept until handed over to Bukit Aman officers at 2pm on 26 September 1998. The first defendant also says that Tan Sri Rahim Noor was never in the *bilik dokumentasi*.

[35] In my judgment, based on the evidence before the court, on a balance of probabilities, the plaintiff's case is more credible and ought to be accepted. I so hold for the following reasons.

[36] First, the medical evidence shows that an assault took place. A careful scrutiny of Dr Vasantha Ponniah's (SD7's) medical report shows that the plaintiff had complained of pain in his left foot, left thigh, left leg and lower back. He also complained of pain over his pelvis and his right eye. Dr Vasantha has noted that the plaintiff had limited flexion of the spine due to pain. Similarly she noted bruises over both wrists of the plaintiff; a bruise over the postero-lateral aspect of the left thigh in the mid-thigh area, and another bruise on the postero-lateral aspect of the left leg. In her evidence in court, Dr Vasantha confirms that with the bruises there was swelling. It is to be noted that Dr Vasantha only saw the plaintiff three days after he was assaulted.

[37] Second, the plaintiff from the time he was brought to the IPK, Kuala Lumpur and until he was handed over to Bukit Aman officers at 2pm on 26 September 1998, was never placed in a lock up as required by the Lockup Rules 1953. All prisoners have to be placed in a lock up after arrest. This is mandatory after 6.30pm (see r 20 of the Lockup Rules). The Rules provide that prisoners could not be moved out of the lockup between 6.30pm and 6.30am which must mean that no interrogation could be conducted during these hours. All movements of prisoners in and out of lockups are to be recorded. All this is for the protection of prisoners and also to prevent accusations against the police. The first defendant says that his only instruction was to arrest the plaintiff and take him to the IPK. He had no instructions to conduct any investigation and the only instruction was to prepare all documentations to hand over the plaintiff to Bukit Aman.

[38] Third, there was no explanation given by the defence as to why the plaintiff was not taken to Bukit Aman immediately after the arrest.

[39] Fourth, according to the first defendant's version of events, there is a substantial block of two and half hours of unexplained time where nothing happened on the first floor of the IPK, that is to say, between 1.20am and 4am. Hence the first defendant's version of events is highly questionable. After finishing the *senarai rampasan* at about 1.30am., there was no reason why the photographs of the plaintiff were not taken immediately and the plaintiff placed in a lock up. After all, Sgt Samat (SD4), the photographer, was on duty all the time and available. Even the story of the time being occupied preparing the *senarai rampasan* has material and serious contradictions. According to the first defendant, he says that shortly after the plaintiff was taken to the Bilik Dokumentasi, Sgt Samat (SD4), Cpl Teoh and Cpl Sharif arrived on his instruction to help in the documentation and inspection of the documents seized from the plaintiff's house. He says he also instructed Sgt Samat to take photographs. However, Sgt Samat's evidence is completely different. He says that he received a call from the first defendant

at 3.45am to take photographs of the plaintiff who was then in the *Bilik Dokumentasi*. As I have pointed out above, Sgt Samat's first witness statement (P7) states the time of this instruction as 4am. Neither of these witness statements says anything about him being instructed to go to the *Bilik Dokumentasi* about midnight to help with the documentation, as claimed by the first defendant.

[40] Then there is the evidence of D/Cpl Abdul Hamid bin Jaffar (SD3). He says categorically that only he and Insp. Wong (who was never called as a witness) helped the first defendant to prepare the senarai rampasan. He makes no mention of Teoh or Sharif. He explains the process in his evidence and says that it took about 1-2 hours. Cpl Yunus (SD2) also says that the senarai rampasan was compiled by the first defendant, Insp. Wong and Hamid (SD3). He explains that he and L/Cpl Johari (who was never called as a witness) kept guard on the plaintiff, while the first defendant, Wong and Hamid (SD3) prepared the list.

[41] I am of the opinion that the glaring discrepancy between the first defendant's evidence and the evidence of the others shows that the versions are being concocted to present some kind of a chronology of events to cover the time between midnight and 4am. It is a reasonable inference that none of these versions and, in particular, that of the first defendant reflects the truth. And all the more so when there is this gap in time between at least 1.20am and 4am which remains unexplained. It is fair to ask: What were these police officers really doing with the plaintiff in the early hours of the morning when he should have been placed in the lock up? Their conduct of not keeping the plaintiff in the lock up and their contradictory answers invite the inference that they were covering up some unlawful act in relation to the plaintiff.

[42] Fifth, according to the investigating officer, SAC Hadi Ho (SD11), Tan Sri Rahim Noor (the IGP) was actually present in the IPK, Kula Lumpur building between 12 midnight (25 September) and 3 am (26 September) and the time coincides with the time that the plaintiff allegedly was assaulted by the first defendant, Tan Sri Rahim Noor and others. However, according to SAC Hadi Ho (SD11) he was told by Tan Sri Rahim Noor that he was at the IPK for a meeting with the Director of Special Branch, Bukit Aman and the Deputy Director to receive a briefing from the Head of Special Branch, Kuala Lumpur. According to SAC Hadi Ho, Tan Sri Rahim Noor had said he had received information from the Special Branch KL that members of a group of silat exponents planned to gather in various parts of KL on 26 September 1998. SAC Hadi Ho also said that the Chief Police Officer of Kuala Lumpur, Dato' Kamaruddin, was not only not present at the meeting, he was in fact not informed of the meeting at all. I make a finding of fact that Tan Sri Rahim Noor was present at the IPK between 12 midnight and 3am but I am

unable to accept that Tan Sri Rahim Noor was at the IPK for the reason that he had given. I am unable to accept for the following reasons:

(a) Since the meeting involved the IGP, the Director of Special Branch, Bukit Aman and his Deputy Director, why should the meeting be held at the IPK, KL, when it is more appropriate protocol-wise and convenient to hold it at Bukit Aman?

(b) Why was the meeting held at a very unusual time i. e. between 12 midnight and 3am?

(c) Why must the meeting take so long ie almost three hours just to discuss only a single agenda, that is, pertaining to what the silat exponents intended to do?

(d) Since the meeting involved the IGP and top officers from Bukit Aman, why was the CPO of Kuala Lumpur not present at, or not informed of, the meeting?

(e) Considering that there was a very serious allegation made against Tan Sri Rahim Noor by the plaintiff and considering that he was present at the IPK at the material time, why wasn't Tan Sri Rahim Noor called by the defence to testify to rebut the allegation, if indeed the allegation is false?

[43] Sixth, there is also a major and material contradiction between the first defendant's evidence in court and what he told SAC11 Hadi Ho (SD11). As stated above, the first defendant's evidence is that his only instruction (received from SAC II Salamuddin, Head of Special Branch, IPK, Kuala Lumpur) was to arrest the plaintiff and take him to the IPK. He had no instruction to conduct any investigation and the only instruction was to prepare all documentations to handover the plaintiff to Bukit Aman. On the other hand, SAC II Hadi Ho (SD11), when asked in cross-examination if he had asked the first defendant why the plaintiff was not put in a lock-up, he said that the first defendant told him that he had to prepare documentations and also that he had to question the plaintiff on various matters pertaining to national security. He said the first defendant told him that he had questioned the plaintiff from time to time until 4am. When asked whether he had asked to see the statements recorded by the first defendant in respect of this purported interrogation, he answered, 'Dalam masa itu tidak relevan kepada penyiasatan saya'. He also agreed that no interrogation should be done after 6pm in view of the provisions of the Lock-Up Rules. When asked if he had asked the first defendant why he had not postponed the interrogation of the plaintiff until the next morning, SD11 answered that he did pose the question. SD11 said the answer of the first defendant was that he needed to question the plaintiff on urgent matters regarding the *reformasi* movement based on information received by the Special Branch and also to

ask the plaintiff to explain documents seized from his home. When it was put to SD11 that the investigation of the plaintiff was under Bukit Aman and not under the first defendant, SD11's response was that he was not sure of the arrangement. I accept the plaintiff counsel's submission that the above contradiction again shows that the evidence of the first defendant lacked credibility and seemed to be shifting substantially depending on the circumstances.

[44] Seventh, there is the pertinent observation that the Kuala Lumpur Police Department (meaning SD11 and his immediate superior, SAC 11, Mat Zain Ibrahim) and the DPP's (Deputy Public Prosecutor's) office, having rejected the plaintiff's complaint in his police report, were, however, not willing to prosecute the plaintiff for lodging a 'false' report against the IGP and the first defendant (and the others). Initially, SD11 and his superior (SAC 11 Mat Zain) recommended to the DPP to NFA (meaning to take 'No Further Action') on the plaintiff's police report and, instead, to have the plaintiff charged under section 182 of the Penal Code for lodging a false police report against the IGP and the first defendant. According to SD11, the file was referred to the DPP's office on 29 July 1999. Although the DPP's office was very slow and did not respond even after 8 months, strangely, there was no follow up by the police. Not a single reminder was sent to the DPP's office. The file finally returned some nine months later on 27 April 2000 from the DPP's office to SD11's superior SAC II Mat Zain Ibrahim with a decision to 'NFA' the case. In fact the respond of the DPP was:

> Minit 5 dan keterangan di dalam kertas siasatan telah diteliti dan perkara ini telah dibincang bersama Y. Bhg. Dato' Timbalan Ketua Bahagian Pendakwaan. Setuju kes ini di NFA seperti cadangan di dalam minit tuan di paragraph 4 atas alasan-alasan yang dikemukakan.

[45] It is significant and disquieting to observe that the DPP (Puan Zauyah binti Loth Khan), having taken so much time (ie nine months) over the matter, yet in her minutes did not refer at all to the recommendation of SD11 (and endorsed by his superior, SAC 11 Mat Zain) that the plaintiff be prosecuted for making a false police report. That recommendation was simply ignored. Also equally disturbing is the observation that despite the plaintiff's serious allegation against the IGP and the first defendant coupled with the fact that the DPP had ignored SD11's recommendation, yet neither SD11 nor his superior, SAC Mat Zain, considered it fit to refer the IP (Investigation Papers) back to the DPP's office for a direction. Now, in this regard there is no suggestion by the Senior Federal Counsel that there was an oversight on the part of the DPP's office; and Puan Zauyah was not called to give an explanation for the long delay in responding and the omission to direct. The submission of the Senior Federal Counsel is merely — and I think the learned Senior Federal Counsel, with respect, appears to have missed the

point — that it is the sole discretion of the Public Prosecutor whether or not to charge the plaintiff for lodging a false report. Hence, here, several disturbing but pertinent questions arise:

a Why did it take nine months for the DPP to respond to SD11's recommendations?

b Why didn't SD11 or his superior (SAC Mat Zain) send any reminder to the DPP's office when the DPP's office took such a long time to respond?

c Why did the DPP's office purposely ignore the recommendation of the police that the plaintiff be charged for making a false report against the IGP?

d Why were SD11 and SAC Mat Zain not serious in pursuing their recommendation with the DPP's office when a very serious and scandalous accusation had been formally made against their IGP and, instead, were quick to have the investigation file closed?

[46] Based on the above facts, observations and queries, I think it is fair to draw an inference that both the DPP's office, SAC Hadi Ho and SAC Mat Zain well knew that there was a lot of truth in the plaintiff's police report against Tan Sri Rahim Noor and the 1st defendant (and the others). I regret to remark here that I am also making an inference that the investigation carried out by SAC Hadi Ho in respect of the plaintiff's police report was nothing but a mere sham.

CONCLUSION THAT ASSAULT DID TAKE PLACE AS ALLEGED BY PLAINTIFF

[47] It is my finding upon an evaluation of the evidence that the plaintiff was unshaken as a witness of truth in the witness stand. He stood firmly by his story which he had detailed in the document marked as P2 and in his police report on 13 March 1999. Senior Federal Counsel in his submission attempts to raise contradictions between the plaintiff's police report and his evidence in court. It is my finding that a careful scrutiny of the report and the evidence in court will show that the contradictions, if at all there are any, are trivial in nature and that the versions in P2 and in the plaintiff's police report do not differ substantially from the version given by the plaintiff in court.

[48] In the present case it is my conclusion that an analysis of the evidence as explained above including the medical evidence, the credibility of the evidence of the plaintiff, the events that happened on the first floor of the IPK on 25 and 26 September 1998, the unexplained gap of two and a half hours, the contradictions between the first defendant's evidence and the evidence of

the other defence witnesses, the fact that the plaintiff was not put in a lock up without any reasonable explanation and in breach of the Lockup Rules, all taken together show that the plaintiff has proven on a balance of probabilities that he was assaulted in the manner he has described.

WHETHER THE PLAINTIFF WAS DENIED ACCESS TO A LAWYER?

[49] It is not disputed that the plaintiff did not meet with any lawyer throughout the 57 days of his detention. In his evidence he says that he was not given the right of access to counsel throughout his detention. Not only that: prior to his first family visit on 21 September 1998 (even this was 27 days after his arrest!), he was warned not to file any habeas corpus application. He maintains that he did ask his interrogating officer at Bukit Aman during the first week of interrogation whether he could see a lawyer but he received a negative answer. Needless to stress here that access to a lawyer is a constitutional right, as provided for under art 5(3) of the Federal Constitution.

[50] Further, the plaintiff has asserted that his interrogation ended after 19 days. Even going by the defence position that access to counsel would only be granted at the completion of the investigation (which in my view should not have been the case), then, why was access to counsel not granted after 19 days? Such a refusal of access to counsel is clearly an unreasonable conduct and shows mala fide on the part of the police.

THE DECLARATION

[51] For the reasons explained above, I grant the declaration set out in para 14(a) of the statement of claim.

GENERAL DAMAGES FOR WRONGFUL ARREST AND DETENTION FOR 57 DAYS

[52] Encik Sivarasa, the learned counsel for the plaintiff, after referring to several case authorities, submits that the appropriate amount for an unlawful detention of 24 hours in Malaysia would be in the region of RM25,000 to RM30,000. He concedes that an award for a period of 57 days should not be a simple arithmetic calculation but would also have to be adjusted. The learned counsel submits that a simple mathematical approach gives 57 multiplies by (say) RM25,000 which amounts to RM1,425,000. He, however, submits that an appropriate amount would be about half of that sum, that is to say, RM700,000. In my judgment this is a reasonable proposition.

[53] Encik Sivarasa further submits that there are a number of significant aggravating factors in the treatment of the plaintiff during the detention as detailed above in this judgment. The aggravating factors are the breach of the plaintiff's constitutional and fundamental rights, including right of access to counsel; the denial of access to family members within a reasonable time and frequency of the visits; the length of the period of solitary detention; the interrogation for 19 days on matters not related to internal security; the repeated assault of being handcuffed and blindfolded each time the plaintiff was moved from his cell, which is a distressing experience; and the injury to the plaintiff's reputation as a consequence of the arrest and detention. The learned counsel submits that the total amount of general damages for false imprisonment taking into account such aggravating factors should be increased to RM1,500,000. I am in agreement that there are aggravating factors and that the amount of RM700,000 should be increased taking into account these aggravating factors. But I think increasing the amount of RM700,000 to RM1,500,000 is rather too excessive. In my judgment, taking into account the aggravating factors, the award for false imprisonment should be increased from RM700,000 to RM1m.

GENERAL DAMAGES FOR THE ASSAULT AND ILL-TREATMENT

[54] In my judgment, on the evidence detailed above on the assault, taking into account the aggravating factors, an appropriate amount for the vile treatment meted out to the plaintiff, physical injuries suffered, the pain and suffering and the mental anguish and humiliation, the delay in giving medical treatment etc, the plaintiff should be awarded the sum of RM500,000.

EXEMPLARY DAMAGES

[55] In my judgment the circumstances of this case are such that it is appropriate for an award of exemplary damages. In the landmark case of *Rookes v Barnard* [1964] AC 1129, Lord Devlin stated that one of the categories of cases in which an award of exemplary damages may be made is a case that involves oppressive, arbitrary or unconstitutional action by the servants of the Government.

[56] In the present case, the behavior of the defendants is inhumane, cruel and despicable, as the plaintiff was not just arrested and detained unlawfully for 57 days but was also subjected to a vile assault, unspeakable humiliation, and prolonged physical and mental ill-treatment. The Special Branch Department of the Police Force must not only be neutral but must also be seen to be neutral and non partisan. It must be above politics. The practice of torture of any kind is to be detested. The despicable conduct of the then Inspector General of Police, Tan Sri Rahim Noor, was shameful and a

disgrace. He had shown an extremely bad example to the thousands of men under his charge. The award of exemplary damages is necessary to show the abhorrence of the court of the gross abuse of an awesome power under the Internal Security Act 1960. Any gross abuse of this power (which clearly is the case here), therefore, must be visited with an award of exemplary damages to ensure that the extent of abuse is kept to the most minimal, if not eliminated completely. The practice of torturing detainees by the police force can never and should never be condoned by the courts. The court must show its utmost disapproval in no uncertain terms.

[57] Finally, access to a lawyer is one of the fundamental safeguards that a person has under the Federal Constitution that ensures he is not kept in incommunicado detention and abused. Access to a lawyer ensures that the treatment of the detainee has some transparency and that he is accorded due process as stipulated by the Constitution and the law. Denial of access to counsel allows detaining authorities that act mala fide to do as they wish with a detainee including placing obstacles to legal recourse. In many instances when access to counsel is finally accorded to the detainee, it is usually too late for him to take meaningful legal recourse as the evidence has disappeared or, more importantly, the mischief or injury that the access was supposed to prevent i.e. physical and mental ill-treatment etc. has already happened.

[58] In my judgment, in the circumstances of the present case, an award of RM1m as exemplary damages, is appropriate.

[59] I am awarding interest at the rate of 8 percent per annum on all the above sums to run from the date of judgment until realization; and I order that all costs of these proceedings be paid by the defendants to the plaintiff.

Plaintiff's claim allowed.

Reported by Andrew Christopher Simon